

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

MARY DOE

Appellant

v.

ERIC GREITENS, ET AL

Respondents

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**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

DOCKET NUMBER WD80387

DATE: October 3, 2017

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Appeal From:

Circuit Court of Cole County, MO  
The Honorable Jon Edward Beetem, Judge

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Appellate Judges:

Division Three  
Alok Ahuja, P.J., Thomas H. Newton, and Cynthia L. Martin, JJ.

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Attorneys:

Ronald Eisenberg, Chesterfield, MO

Counsel for Appellant

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Attorneys:

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

MARY DOE, Appellant,  
v.  
ERIC GREITENS, ET AL, Respondents

**WD80387**

**Cole County**

Before Division Three Judges: Ahuja, P.J., Newton, and Martin, JJ.

The circuit court dismissed Mary Doe’s petition seeking to enjoin the enforcement of parts of Missouri’s Informed Consent Law, section 188.027 RSMo (2014), claiming a violation of her rights under the state’s Religious Freedom Restoration Act (RFRA). Doe also sought to invalidate parts of the Informed Consent Law on the ground that they violate her rights under the Religion Clauses—the Free Exercise and Establishment Clauses—of the First Amendment. Doe was allegedly forced to comply with the Informed Consent Law’s requirements, including acknowledging receipt of a booklet, submitting to an ultrasound and audible heartbeat offer, and waiting for seventy-two hours, before undergoing an abortion in 2015. She has claimed that the law is based on the tenets of a religious faith in which she does not believe. She also claims that compliance with its requirements restricts her free exercise of religion and fosters an excessive entanglement between the state and adherents of a religious belief that fetal tissue is a separate and unique human being from conception whose destruction is morally wrong, thus constituting an unlawful establishment of religion. The circuit court ruled that Doe’s petition failed to state a claim, that is, she failed to present sufficient facts which, if taken as true, would indicate that a violation of the law occurred or that she was entitled to a legal remedy. Doe appeals the ruling as to the RFRA claims, which she argues is coextensive with her Free Exercise rights, and the Establishment Clause claim.

**TRANSFERRED TO THE MISSOURI SUPREME COURT.**

**Division Three Holds:**

When a litigant raises a real and substantial constitutional claim, the Missouri Constitution gives our supreme court the exclusive authority to consider its merits. Because Doe’s petition was dismissed for failure to state a claim, we must assume that all facts asserted in the petition are true, and we must liberally construe all reasonable inferences in her favor. We assume that her RFRA claim, which alleges unlawful government restriction of her actions or refusals to act that are substantially motivated by her religious belief, may be coextensive with her Free Exercise Clause claim. Accordingly, we include the latter in our preliminary review, despite her failure to address the Free Exercise claim in a separate point relied on, to determine whether her Religion Clause claims are real and substantial. One factor that we may consider in our analysis is whether her claims present matters that have been considered previously by the courts.

As to her Establishment Clause claim, Doe has alleged that the sole purpose of the law is to indoctrinate pregnant women into the belief held by some, but not all, Christians that a separate and unique human being begins at conception. Because the law does not recognize or include other beliefs, she contends that it establishes an official religion and makes clear that the state disapproves her beliefs. We believe that Doe’s Establishment Clause claim presents a contested

matter of right that involves fair doubt and reasonable room for disagreement and, thus, is real and substantial. As to her Free Exercise Clause claim, Doe asserts an unconstitutional burden on her rights and the lack of a compelling governmental interest on several grounds. For example, she alleges that the ultrasound the law required her to undergo is not medically necessary and interfered with her bodily integrity, each of which runs counter to her faith. She also claims that the Informed Consent Law's requirements violated her right to make her abortion decision freely, voluntarily, and without coercion in view of their effect of causing her guilt and shame for seeking an abortion. While not required to read the booklet, she was required to certify its receipt, which could arguably constitute a substantial burden on her religious exercise. On preliminary review, her Free Exercise claim also appears to present a contested matter of right involving fair doubt and reasonable room for disagreement.

Neither the Missouri Supreme Court nor the U.S. Supreme Court has considered whether a booklet of this nature, an ultrasound, an audible heartbeat offer, and a seventy-two-hour waiting period violate the Religion Clause rights of pregnant women who do not believe what Doe characterizes as the "Missouri Tenet." The courts have ruled that the state may favor childbirth, but existing precedent does not address whether the Informed Consent Law imposes concrete regulations on conduct that impermissibly interfere with Religion Clause interests for the stated purpose of ensuring that a woman's decision to undergo an abortion is informed and voluntary. In *Webster v. Reproductive Health Services*, the U.S. Supreme Court refused to consider whether the preamble to Missouri's abortion law was constitutional because in itself the statement about when human life begins did not regulate conduct "in some concrete way." In *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, the Missouri Supreme Court upheld the constitutionality of a twenty-four-hour waiting period but did not consider whether a seventy-two-hour wait violated a woman's Religion Clause rights. A divided Eighth Circuit Court of Appeals in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, upheld a South Dakota law requiring physicians to inform their patients that "abortion will terminate the life of a whole, separate, unique, living human being" and "the pregnant woman has an existing relationship with that unborn human being." The court did so, however, on the basis of a First Amendment compelled-speech challenge to the law. Given that Doe's constitutional claims appear to raise questions of first impression involving fair doubt and reasonable disagreement, we find them to be real and substantial and not merely colorable.

Accordingly, we order transfer to the Missouri Supreme Court.

**Opinion by: Thomas H. Newton, Judge**

October 3, 2017

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**THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.**